SUPREME COURT, U.S.
Supreme Court, U. S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-530

ROBERT BROWN,

*Petitioner,*

*vs.*

PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

**On Petition for Writ of Certiorari to the State of New York Court of Appeals and/or the Supreme Court of the State of New York, Ninth and Tenth Judicial Districts**

JOEL HIRSCHHORN, P.A.
*Attorney for Petitioner*
742 N.W. 12th Avenue
Miami, Florida 33136
(305) 324-5320

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The Petitioner, ROBERT BROWN, prays that this Court will issue its Writ of Certiorari to the State of New York Court of Appeals and/or The Supreme Court of the State of New York, Ninth and Tenth Judicial Districts. The decision sought to be reviewed in the State of New York Court of Appeals, which was refused July 7, 1975,

(App. 3) was the Order of the Supreme Court of the State of New York for the Ninth and Tenth Judicial Districts affirming the judgment of conviction of Petitioner, Robert Brown. Said Order being entered on April 25, 1975. (App. 2).

## CITATION TO OPINION BELOW

The opinions and decisions of the State Courts in this cause have not been reported. However, the Appendix to this Petition contains said opinions and decisions in their entirety.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3) because Petitioner has been deprived of his First, as well as Fourteenth Amendment rights, through the decisions and judgments of the State of New York Court of Appeals, The Supreme Court of the State of New York for the Ninth and Tenth Judicial Districts, and the New York District Court in and for Suffolk County.

The decision on which review is sought was rendered by the highest Court of the State. All appellate remedies of the state courts have been exhausted as to the questions presented herein.

## QUESTIONS PRESENTED

1. Whether a defendant who was found guilty of promoting obscene material and put on probation can have an additional condition of probation assessed against him

which requires him to avoid and refrain from production, presentation, promotion, sale or any other involvement with sexually explicit materials either directly or indirectly when such provision is clearly unreasonable, unrelated to the offense charged and violative of his First and Fourteenth Amendment freedoms.

2. Whether a defendant has been denied Fourteenth Amendment due process where the trial judge instructed the jury that the community standard to be applied in determining the obscenity vel non of the materials in a prosecution for promotion of obscene material commenced in 1969, but tried in 1973, are those of 1969, especially where no evidence is adduced as to these standards and where the Court further instructed that the existence of certain acts render any material obscene.

## HOW THE FEDERAL QUESTIONS WERE PRESENTED

The Federal questions were raised in these proceedings during the course of the trial, on Motion for New Trial, as well as by appropriate appellate brief.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions and statutes are set forth in their entirety in the Appendix hereto:

First Amendment to the United States Constitution (A.4).

Fourteenth Amendment to the United States Constitution (A.4).

## STATEMENT OF THE CASE

This was a criminal proceeding commenced in 1969 against the Petitioner, Robert Brown, for a violation of Section 235.05 (1) Penal Law, State of New York. The nature of the charge was an alleged violation of the law concerning promotion of obscene material. The Defendant subsequently went to trial in March, 1973, at which time the Roth-Memoirs Test was employed.

The jury was instructed to apply 1969 standards in their deliberations even though the prosecution never elicited what said standards were. The trial judge also further instructed that if the materials involved depicted certain acts, they were automatically obscene.

The Defendant was convicted and, on a finding of guilt, sentenced to three years probation with the additional condition of probation that he:

> avoid and refrain from production, presentation, promotion, sale, or any other involvement with sexually explicit materials either directly or indirectly.

The actions of the Trial Court were affirmed by The Supreme Court of the State of New York for the Ninth and Tenth Judicial Districts and Leave to Proceed Further to the State of New York Court of Appeals was subsequently denied.

## REASONS FOR GRANTING WRIT

### I.

One of the conditions of probation which the Petitioner, Robert Brown, was required to comply with was to:

> Avoid and refrain from production, presentation, promotion, sale or any other involvement with sexually explicit materials whether directly or indirectly.

This condition is not only unreasonable, and unrelated to the offense charged; but it is violative of Petitioner's First and Fourteenth Amendment rights.

The entire condition set forth supra is pregnant with confusion and constitutional infirmity. Neither the Petitioner nor any probation officer can deduce what acts fall within the phrase "any other involvement", or "promotion" mean. Furthermore, Petitioner is precluded from "indirectly" being involved with "sexually explicit materials". What is to be considered sexually explicit, and does the term "indirectly", for example, preclude Petitioner from entering a store which sells a marriage manual? It is exhausting to attempt to determine what falls within the condition required by the Court below. (C.f. *Miller v. California*, — US 93 S.Ct. 2607 (1973) where the United States Supreme Court required said conduct to be "specifically defined".)

Furthermore, the condition is unreasonable in that Petitioner was found guilty of promoting *obscene* material; however, he is precluded from any and all involvement with sexually explicit materials. Materials which contain

sexually explicit matter need not be obscene and the *a fortiorari* reasoning of the Lower Court can not be tolerated under the First and Fourteenth Amendments especially in light of *Miller v. California*, ____U.S.____, 93 S.Ct. 2607 (1973).

The condition's unreasonableness is further evident when it is possible that Petitioner's owning of a "sexually explicit" magazine, which he keeps in his own home may be in violation of the terms of his probation.

More important, however, and directly related to the unreasonable, arbitrary, and indefinite nature of the aforementioned condition, is the fact that said condition violated and precludes the Petitioner from exercising his First Amendment freedoms. It must be noted that said condition precluded Petitioner from even personal involvement with sexually explicit material and not necessarily obscene material. There has never been, nor can there be found, a lack of constitutional protection for sexually oriented material. From *Roth v. United States*, 354 U.S. 476, (1957), to *Miller v. California*, supra, this Court has recognized that sex and obscenity are not synonymous terms. The mere fact sexual materials are involved does not mean First Amendment freedoms vanish. It is when those materials are obscene that this cloak of protection is removed. It must be limited:

> . . . to works which taken as a whole, appeal to the prurient interest in sex, which portrays sexual conduct in a patently offensive way, and which taken as a whole, do not have serious, literary, artistic, political, or scientific value. *Miller*, supra, 2615.

This is very important instanter as Petitioner, as brought out in trial, is primarily involved in medical textbooks and other similar books, which would clearly not be obscene. Even the Court in *Miller*, supra, recognized:

> . . . Medical books for the education of physicians and related personnel necessarily use graphic illustrations in description of human anatomy. Thus, clearly not all materials can be prohibited.

Moreover, the condition made a part of the Petitioner's probation would preclude him from having, using, or producing such materials in his own home or for his own use. Even obscene material is given this protection when found in the home. As held in *Stanley v. Georgia*, 394 U.S. 557, 565, (1969):

> Whatever may be the justification for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means the State has no business telling a man, sitting alone in his own house what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.
>
> See *In Re: Mannino*, 14 Cal. App.3d 953, 92 Cal. Rptr. 880, (1971).

"The line between speech unconditionally guaranteed and speech which may be regulated, suppressed, or punished, is finely drawn." *Spiser v. Randall*, 357 U.S. 513

(1958). The separation of legitimate from illegitimate speech requires sensitive tools. Those tools were not utilized sub judice, and this cause should be remanded so that the Lower Court may modify or strike the condition of probation entered herein.

## II.

THE JURY IN ITS DELIBERATIONS AGAINST THE PETITIONER WERE INSTRUCTED PURSUANT TO THE ROTH MEMOIRS TEST AND WERE FURTHER INSTRUCTED TO APPLY THOSE STANDARDS OF MARCH AND APRIL, 1969.

That charge was made pursuant to Section 235.00, Penal Law, where obscene is defined as:

> Any material or performance is obscene if (a) considered as a whole, its predominant appeal is to prurient shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value.

Petitioner contends that pursuant to this test the jury must apply the standards that existed at the time of trial. The language of said statute speaks in terms of the present with no reference to the past. In fact, the term "contemporary" as used by the court means ". . . happening, existing, living, or coming into being during the

same time." Webster, Third New International Dictionary, 1971. The Court therefore clearly set forth an incorrect standard.

Furthermore, there was never any indication that the jury was in fact familiar with what the "community" standard was in 1969 or whether in fact they even resided in the "community" in 1969, or of age to be familiar with said standard. Nor, did the State adduce any testimony at the time of trial as to what the standards were in 1969 so that a jury in 1973 could even apply a 1969 set of standards.

This Court has recently held in regards to obscenity prosecution that:

> In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members. *Miller* supra.

These protective features did not exist in the trial below. Just as a jury in California could not know or be familiar with the standards in Arkansas and thus declare a book to be obscene based on Arkansas standards, neither can a local jury in 1973 declare material to be obscene based on a 1969 standard, where there was neither a showing that said jurors were familiar with a 1969 standard nor any evidence presented as to such a standard. Moreover, Petitioner in an obscenity prosecution is clearly en-

titled to a benefit, if any, in the charge of the law and standards while his case is pending. *Jenkins v. Georgia*, ____U.S.____, 94 S.Ct. 2750 (1974); *Hamling v. United States*, ____U.S.____, 94 S.Ct. 2887 (1974).

The Trial Court further instructed:

> In addition, there must be a finding that the matter depicted is declared to be obscene by the courts of the state. Representations and descriptions of the following are some examples of conduct declared obscene under state law when shown in the context of being utterly without redeeming social value.
>
> a) Rigid male genitals.
>
> b) Heterosexual copulation, masturbation, male homosexuals, sodomy, heterosexual sodomy, self-sodomy, and simulated defecation.
>
> c) Heterosexual acts depicting incest between father and daughter, also mother and son. Direct male genitalia, masturbation, foreplay, oral sodomy, etc.
>
> d) Personal advertisements in a magazine soliciting sodomy.
>
> e) Heterosexual intercourse.
>
> f) Scenes depicting close contact between nude males and females indicating sexual activity. (Pages 31-32)

The Lower Court thus instructed that these depictions are obscene if they are found in a context which is utterly without redeeming social value. This was clearly error as the Court led the jury to believe that when this "conduct" exists, and there is no social redeeming value, the additional tests of considering the material as a whole, whether its predominant appeal is to a prurient interest in sex and whether the material is substantially beyond the customary limits of candor, is ignored. This instruction flies in the face of *Roth v. United States*, 354 U.S. 476 (1957) and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). Sex and obscenity are not synonymous and any obscene material is free from constitutional protection.

Based upon these improper, prejudicial and irregular jury instructions, Petitioner was entitled to a reversal, consistent with First Amendment and Fourteenth Amendments to the United States Constitution. Due Process requires that a defendant's conviction be based on proper jury instruction:

## CONCLUSION

Petitioner, Robert Brown, respectfully requests this Honorable Court to grant a Petition for Writ of Certiorari to the State of New York Court of Appeals and/or the Supreme Court of the State of New York for the Ninth and Tenth Judicial Districts.

Respectfully submitted,

JOEL HIRSCHHORN, P. A.
*Attorney for Petitioner*
742 Northwest 12th Avenue
Miami, Florida 33136
(305) 324-5320

By: /s/ Yale T. Freeman
YALE T. FREEMAN

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was mailed to the Honorable Henry F. O'Brien, District Attorney of Suffolk County, Griffing Avenue, Riverhead, New York 11901; and I also certify a true and correct copy of the above and foregoing was mailed to the Honorable Lawrence H. Cook, Associate Judge, State of New York Court of Appeals.

By: /s/ Yale T. Freeman

YALE T. FREEMAN